No. 83-280

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UTILITY TRAILER SALES COMPANY,
Appellant,

VS.

MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190 OF NORTHERN CALIFORNIA and JERRY BOWERS,
Appellees.

On Appeal from the Court of Appeal of the State of California

MOTION TO DISMISS OR AFFIRM

DAVID A. ROSENFELD
COUNSEL OF RECORD
VAN BOURG, ALLEN, WEINBERG & ROGER
A PROFESSIONAL CORPORATION
875 Battery Street
San Francisco, CA 94111
Telephone: (415) 864-4000

Attorneys for Appellees Machinists Automotive Trades District Lodge No. 190 of Northern California, and Jerry Bowers

November 7, 1983

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

I. COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether a State Law Requiring Employers to Idemnify Employees for Any Expenses Incurred by the Employee, Including the Loss of Tools Supplied by the Employee, Is Preempted by the Obligation to Bargain Contained in the National Labor Relations Act

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED
CASES

STATUTES

RULE

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II. COUNTERSTATEMENT OF THE CASE

Although the statement of the case contained in Appellant's Jurisdictional Statement is largely correct, we emphasize the relevant facts with respect to whether a substantial federal question is presented by this appeal.

Appellees, a labor organization and Jerry Bowers, an individual worker, sought relief under a state statute providing generally that employers must indemnify employees for any loses which they incur in the course of their employment. California Labor Code, Section 2802. After the trial court ruled against the union and the employee, an appeal was filed with the California intermediate appellate court which reversed. The court held that the statute required the employer to reimburse Mr. Bowers for those tools which he utilized in the course of his employment as a mechanic but which were stolen during a holiday weekend.

The question presented is

whether that statutory provision is preempted by the general obligation to bargain contained in the National Labor Relations Act where, in fact, the union and employer had bargained over the issue of tool insurance but had been unable to reach any agreement requiring that employer under the terms of the collective bargaining agreement to reimburse any mechanic whose tools were stolen or lost.

As we shall show, no substantial federal question is presented by way of this appeal for it is well settled that the states may legislate in areas affecting of employees so long as the states do not legislate so as to regulate the bargaining process.

III. THE STATES MAY REGULATE THE EMPLOYMENT RELATIONSHIP SO LONG AS THEY DO NOT REGULATE THE COLLECTIVE BARGAINING PROCESS

California Labor Code Section 2802 provides:

An employer shall indemnify

> his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful.

That statute applies to a variety of circumstances generally requiring employers to indemnify or reimburse employees for expenses which they incur as a result of their employment. For example, it applies to a newspaper reporter who must defend a libel action brought as a result of a story which he gathered in the course of his employment. Douglas vs. Los Angeles Herald-Examiner 50 Cal App. 3d 449 (1975).

It is part of many provisions of the California Labor Code regulating the employer-employee relationship. The comprehensive legislation governs such matters as the time and manner of

payment of wages, the obligation to provide workers compensation coverage, prohibitions against lie detectors, the right of employees to see their personal files and many other statutes directed to protecting workers in their employment relationship. The statutes cover all employees whether managerial, supervisory or hourly paid and irrespective of whether they are covered by a collective bargaining agreement or not.

In this case, the compelling public benefit behind labor protection 2802 is to prevent employees from becoming either insurers of the capital assets of their employers or replacing capital asets.

The preemption argument raised by the employer was rejected by the California appellate court with a brief reference to Industrial Welfare Commission vs. Superior Court 27 Cal. 3d 690, appeal dismissed and cert denied, 449 US 1029 (1980). The appellate court needed no extensive

discussion for the Welfare Commission case extensively reviewed this issue and decisively rejected the premption argument. Because the reasoning of the court was so clear we repeat it with deletions of certain footnotes and citations:

> A number of employers additionally contend that a variety of state and federal labor relation statutes, which have as a principal objective the resolution of employer-employee disputes over wages, hours and working conditions through the collective bargaining process, operate to "preempt" the IWC from "imposing" or "dictating," upon either employers or employees, conditions of employment that have not been arrived at through collective bargaining. Relying upon a number of labor law decisions which have indicated in other contexts that neither the National Labor Relations Board nor similar state agencies may "impose [their] own views of a desirable settlement" in the event of

a dispute over employment conditions [citation omitted] the employers maintain that the IWC lacks authority to "interfere" with the collective bargaining process by mandating minimum permissible employment conditions in matters that are "mandatory subjects" of collective bargaining under the applicable labor statutes.

Taken at face value, the employers' contentions in this regard would have the effect of precluding the IWC from regulating with respect to any of the matters within its jurisdiction. Under each of the labor statutes which apply to the industries regulated by the commission--the National Labor Relations Act, and the Railway Labor Act, and the Agricultural Labor Relations Act--"wages, hours and working conditions" constitute mandatory subjects of collective bargaining. Thus, if these labor statutes in fact prohibited all governmental regulation on any matter that is subject to employee-employer

bargaining, neither the IWC nor any other state or federal agency would have authority to prescribe minimum wages or maximum hours, to promulgate occupational health and safety standards, or to prohibit discriminatory employment practices. The mere recitation of the logical consequences of the employers' argument, of course, signals the extreme tenuousness of the employers' contention.

In fact, the fundamental flaw in the employers' present argument was fully exposed nearly 30 years ago by Justice Jackson in his opinion for the United States Supreme Court in Terminal Assn. v. Trainmen (1943) 318 U.S. 1. In Terminal, an employer covered by the Railway Labor Act challenged the validity of a state agency regulation which, to protect the health and safety of employees, required the company to provide cabooses on designated railroad runs. The employer in Terminal pointed out that the state regulation conflicted with a

specific provision of a collective bargaining agreement that had been negotiated between the employer and employees, and argued that since the question of providing cabooses involved a working condition of the employmnent and thus was a "mandatory subject" of collective bargianing subject to resolution under the Railway Labor Act, state regulation on the subject was prempted by the act.

In Terminal, the Supreme Court unanimously rejected the employer's contention and upheld the validity of the state regulation. In reaching this conclusion, Justice Jackson explained: "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. . . .

"State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phases of which

would be of federal concern. But it cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State . . . from making the order in question."

This reasoning, we believe, fully answers the employers' contention that federal or state labor legislation, fostering collective bargaining, can be read to preempt legislative efforts to prescribe minimum standards of wages, hours and working conditions for the protection of employees. Indeed, as already suggested, the numerous existing federal and state statutes embodying just such "minimum standards" stand as eloquent testimony to the validity of such regulation. Thus, notwithstanding the NRLA and the RLA, the federal government has enacted the Fair Labor Standards Act of

1938 prescribing minimum wages and maximum hours, and the Occupational Safety and Health Act of 1970, authorizing the promulgation of specific standards directly relating to workers' conditions of employment. Moreover, both the Fair Labor Standards Act and federal OSHA contain specific provisions which recognize the states' authority to go beyond the federal legislation in adopting more protective regulations for the benefit of employees.

Furthermore, although the employers argue that state regulation in this field--if permissible at all--must be confined only to matters of minimum wages, maximum hours or working conditions which directly implicate the health or safety of employees, federal and state legislation directed to discrimination in employment demonstrates that governmental entities retain broad authority to establish minimum standards related generally to the "welfare" of employees.

As the Terminal case teaches, the fact that these matters may also constitute proper, indeed mandatory," subjects of collective bargaining does not preclude the state from adopting minimum standards to protect the welfare of workers who may not enjoy sufficient bargaining strength to obtain adequate protection from their employers at the bargaining table. /16

/16The numerous labor law preemption decisions relied uon by the employers are clearly not in point. None of the decisions dealt with a state regulation prescribing a minimum standard for working conditions to protect the health, safety or welfare of employees. Instead, the cases involve either direct state intereference with the collective bargaining process (see, e.g., California v. Taylor (1957) 353 U.S. 553 or with the choice of economic weapons available during a labor dispute (see e.g., Machinists v. Wisconsin Emp. Rel. Comm'n

supra, 427 U.S. 132), or the state's use of its antitrust laws to bar the collective action by employees or employers protected by federal law. (See e.g., Teamsters Union v. Oliver (1959) 358 U.S. 283) As the United States Supreme Court recently observed: "[A]lmost all of the Court's labor law decisions in which state regulatory schemes have been found to be preempted have involved state efforts to regulate or to prohibit private conduct that was either protected by Section 7 [of the NLRA], prohibited by Section 8 [of the NLRA], or at least arguably so protected or prohibited." (New York Tel. Co. v. New York Labor Dept. (1979) 440 U.S. 519, 529)

Contrary to the employers' contention, the Supreme Court has never retreated from its holding in Terminal, quoted above, that the federal labor laws do not "preempt [ ] ...the field of regulating working conditions...." (318 U.S. at p. 7 See, e.g., Malone v.

White Motor Corp. (1978) 435 U.S. 497, 504-505, 512; Baltimore & O. R. Co. v. Commonwealth Dept. of L. & I., supra, 334 A.2d 636, app. dism. for want of a substantial federal question, 423 U.S. 806.)

> Accordingly, we conclude that existing federal and state labor statutes establish no bar to the IWC's promulgation of the 1980 wage orders (citations omitted)"
> 27 Cal 3d at 725-730

Although this case presents a circumstance where the union sought tool theft insurance in bargaining and was unable to reach an agreement with the employer it does not undermine the principle that California has legitimate and compelling reasons to legislate in the area of employee indemnification and it does not interfere with the collective bargaining process. For as the California court noted, such labor legislation does not prohibit the employer and the union from negotiating an alternative solution to the problem of lost or stolen tools so long as that solution does not eliminate the minimum standards provided for in Labor Code Section 2802.

The Appellant's reliance upon

Local 24 IBT vs. Oliver 358 U.S. 283 (1959) is misplaced. For that case dealt with antitrust regulation which voided an important provision of the Teamster agreement which protected the negotiated wage scale by limiting the circumstances under which an owner would drive his leased vehicle for a motor carrier. Thus there was no state interest in welfare but commercial regulation related to antitrust concerns. Indeed, no court since that date has invalidated the type of state labor legislation on the ground of preempt except where that legislation regulates the bargaining process. Cf Machinists vs. Wisconsin Employment Relations Commission 427 U.S. 132 (1976). Moreover, this Court has recently reaffirmed the right of states to regulate the employment relationship so long as the regulation does not directly conflict with any rule established under the National Labor Relations Act. See Belknap,

Inc. vs. Hale __U.S.__, 77, L.Ed. 2d 798 (1983), Sears, Roebuck & Co. vs. Carpenters 436 U.S. 180 (1970), and Bill Johnson's Restaurants, Inc. vs. NLRB __U.S.__76 L.Ed. 277 (1983). Indeed as these cases indicate this Court has substantially narrowed these areas where the states may not regulate. See also New York Telephone Co. vs. New York Labor Dept. 440 U.S. 519 (1979)

In summary, California Labor Code Section 2802 serves a very legitimate state interest providing minimum conditions of employment whereby employees are not required to act as the insurer of the employer's business. It is part of the minimum welfare regulation which this court long ago sanctioned in respect to the workplace and which does not interfere with the collective bargaining process for it leaves the parties free to create other solutions to the question of providing tools within the framework

of this minimum welfare legislation. No issue warranting review by this Court is represented.

IV. NO ISSUE IS PRESENTED IN THE JURISDICTIONAL STATEMENT WITH RESPECT TO THE EFFECT OF THE ARBITRATION DECISION

Amici Curiae suggest that a different issue is presented to this Court with respect to the effect of the arbitrator's award finding that there was no contractual arrangement whereby the employer agreed to reimburse Mr. Bowers for his stolen tools. See Brief Amici Curiae, page 11-15. This issue was not presented in the Jurisdictional Statement and therefore review by this Court is precluded. Supreme Court Rule 15.1

In any case, Amici Curiae concede that this Court has repeatedly held that, notwithstanding the existence of a favorable or unfavorable arbitration award, employees may proceed to seek independent statutory rights where the arbitration award does

not purport to resolve those statutory rights, but only rights under the collective bargaining agreement. See Alexander vs. Gardner-Denver Co. 415 U.S. 36 (1974) and Barrentine vs. Arkansas-Best Freight System Inc. 450 U.S. 728 (1980).

In this case Arbitrator Garbarino was not asked to, and he did not, purport to resolve the applicability of Labor Code Section 2802 to this dispute. He only resolved the question of whether there was a contractual obligation.

Thus there was no interference with the general labor policy in favor of arbitration where the statutory right enforced by the California court has nothing to do with the collective bargaining agreement. Cf. W. R. Grace & Co. vs. Local 759 __U.S.__, 76 L.Ed. 2d 298 (1983) (Arbitrator's decision conflicting with conciliation agreement under Title VII is enforceable)

V. CONCLUSION

For the reasons suggested above, the appeal should be dismissed and the decision of California District Court of Appeal affirmed. Should this Court treat the appeal as a petition for writ of certiorari, it should be denied.

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Respectfully submitted,

VAN BOURG, ALLEN, WEINBERG, & ROGER
A Professional Corporation

By _____
DAVID A. ROSENFELD
Counsel of Record

Attorneys for Appellees

MACHINISTS AUTOMOTIVE TRADES TRADES DISTRICT LODGE NO. 190 OF NORTHERN CALIFORNIA, and JERRY BOWERS